Journal of Air Law and Commerce

Volume 40 | Issue 4 Article 4

1974

Federal Common Law of Aviation and the Erie Doctrine

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FEDERAL COMMON LAW OF AVIATION AND THE ERIE DOCTRINE

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I. INTRODUCTION

OVER the past decade a controversy has developed over the question as to whether there should be a federal common law pertaining to civil aviation litigation. This controversy has evolved as a result of the application of the *Erie* doctrine by federal courts sitting in aviation diversity cases and related forum shopping by skillful litigation counsel. Some very recent federal decisions have generated further controversy in this area of law, particularly a recent decision by the Seventh Circuit Court of Appeals in the case of *Kohr v. Allegheny Airlines, Inc.*[1] That decision holds that there is a federal law of contribution and indemnity based on comparative negligence governing mid-air collisions of aircraft within the United States.

II. ERIE DOCTRINE

In the famous case of *Erie R. Co. v. Tompkins*,[2] the Supreme Court, in overruling the prior decision of *Swift v. Tyson*,[3] ruled that there is no general federal common law and that a federal court sitting in a diversity case must apply the state law as declared by the highest state court. Among the reasons given for that decision was that to allow otherwise might permit different results on the same issue when tried in a state court as opposed to a federal court sit-

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[1] 13 Av. Cas. 17,297 (7th Cir. Sept. 20, 1974).

[2] 304 U.S. 64 (1938).

[3] 41 U.S. (16 Pet.) 1 (1842).

ting in a diversity case. Thereafter, in *Klaxon v. Stentor*,[4] the Supreme Court ruled that a federal court sitting in a diversity case must follow the choice-of-law rule of the state in which the court is sitting.

III. FORUM SHOPPING

Initially under the *Erie* doctrine, choice-of-law was a fairly simple matter, as the state courts applied the *lex loci* rule to tort litigation. In the early 1960's, however, forum shopping came into vogue as various state courts began to apply the choice-of-law rules commonly known as grouping of contacts or interest analysis.[5]

The initial growth of the new choice-of-law rules and related forum shopping occurred in New York. In the *Babcock*[6] case, involving an automobile accident in Canada, a guest of the New York driver of the automobile was permitted to recover against his host in the New York court despite the existence of a guest statute in the place where the accident occurred. Later, this New York choice-of-law rule was extended in the case of *Kell v. Henderson*[7] to permit a Canadian guest to recover against a New York host under New York law for an automobile accident which occurred in New York.

As the New York choice-of-law rule was applied in automobile cases, it began to be applied to aircrash cases. In *Kilberg v. Northeast Airlines*,[8] a New York passenger died in an aircrash in Massachusetts, which had a limitation on wrongful death damages. Suit was brought in a New York court, which allowed the passenger's estate to recover wrongful death damages free of the Massachusetts limitation. The estate of another passenger who died in the same aircrash brought a diversity suit against the airline in a federal court in New York in the case of *Pearson v. Northeast Airlines*.[9] The federal court, applying the *Erie* doctrine, ruled that it would follow the New York choice-of-law rule set forth in

[4] 313 U.S. 487 (1941).

[5] Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

[6] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[7] 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).

[8] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[9] 199 F. Supp. 539 (S.D.N.Y. 1961), *rev'd*, 307 F.2d 131 (2d Cir. 1962).

Kilberg and permit recovery of damages for wrongful death free of the Massachusetts limitation. Later, in *Griffith v. United Airlines*,[10] the Pennsylvania Supreme Court adopted a similar choice-of-law rule to that of New York and allowed unlimited recovery for a Pennsylvania passenger involved in an aircrash in Colorado when Colorado had a limitation on wrongful death damages.

A classic example of forum shopping under the *Erie* doctrine occurred in the "Boston Harbor" litigation arising out of a crash of an airliner within the territorial waters of the State of Massachusetts on October 4, 1960, killing 62 of the 72 passengers on board the aircraft. One hundred and fourteen lawsuits were brought in federal court in Massachusetts, fifty-five lawsuits in the Eastern District of Pennsylvania and several suits in New York state courts. The key choice-of-law problem in that litigation was the fact that Massachusetts had a $20,000.00 wrongful death limitation and Pennsylvania had no such limitation.

The main focus of forum shopping in that litigation was the Eastern District of Pennsylvania, and the thrust of efforts in that jurisdiction was directed at preventing application of the Massachusetts limitation. As a result of those efforts, four separate appeals were decided by the Third Circuit and one decision was rendered by the Supreme Court of the United States. Three of those decisions were related to the trial judge's attempts to have the litigation transferred to a district court in Massachusetts.[11]

The other two appeals in the "Boston Harbor" litigation were involved with the questions as to whether admiralty law applied and the choice-of-law to be applied to wrongful death claims in admiralty.[12] It becomes apparent after reviewing the history of the

[10] 416 Pa. 1, 203 A.2d 796 (1964).

[11] In the Third Circuit decision of Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1963), the court overruled the trial judges's granting of a Section 1404(a) transfer of the Philadelphia cases to the District of Massachusetts on the basis that the trial judge did not have power to transfer the cases. Certiorari was granted by the Supreme Court, and in the case of Van Dusen v. Barrack, 376 U.S. 612 (1964), the Supreme Court ruled that the trial judge, indeed, did have the power to transfer the cases and remanded to the district court. On remand, the plaintiffs moved to have the trial judge disqualify himself, and upon his denial of that motion, a mandamus was brought against the judge. The Third Circuit heard the mandamus action in the case of Rapp v. Van Dusen, 305 F.2d 806 (3d Cir. 1963), *cert. denied*, 393 U.S. 979 (1968), and made a suggestion that the trial judge step down from the case.

[12] In the case of Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963), the Third Circuit held, *inter alia*, that tort claims arising out of the crash

"Boston Harbor" litigation that choice-of-law problems under the *Erie* doctrine can become tremendous obstacles to the disposition of aircrash claims on their merits.

IV. TYDINGS BILL

In order to correct some of the problems which arose out of the *Erie* doctrine and its progeny, as applied to the field of aviation litigation, Senator Tydings (D.-Md.) introduced legislation for a comprehensive body of federal law governing civil legal relations and acts arising out of aviation activity.[13] Despite Senator Tydings' vigorous support of the legislation,[14] the matter died in committee in Congress after Senator Tydings failed to be re-elected. Accordingly, for the present time, it appears that there will be no uniform body of aviation tort law by legislative enactment.

V. RECENT DEVELOPMENTS

Recently, several federal courts have suggested that there should be a federal common law of aviation. In *Aircrash Disaster Near Dayton, Ohio,*[15] a diversity action had been brought by the personal representative of a deceased passenger killed in an Ohio crash involving a TWA jet and a corporate aircraft. That suit was transferred by the Multi-District Panel to a transferee district. After the completion of discovery, one of the companion cases was tried, resulting in a verdict against TWA and in favor of Tann, the owner of the corporate aircraft. Thereafter Tann filed a motion for summary judgment in the passenger's case on the basis of collateral estoppel. The transferee court, in granting Tann's mo-

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of land based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty regardless whether the flight had any maritime connection. Finally, in the case of Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir. 1968), *cert. denied*, 393 U.S. 979 (1968), the Third Circuit, on rehearing, held, *inter alia*, that even though tort claims arising out of an aircrash on navigable waters were cognizable in admiralty, admiralty could apply its own choice of law process to find that Pennsylvania law should be applied to the cases inasmuch as Pennsylvania had the most significant contacts with the cases.

[13] S. 3305, S. 3306, & S. 4089, 90th Cong., 2d Sess. (1968); and S. 961, 91st Cong., 1st Sess. (1969). *See generally* Sanders, *The Tydings Bill*, 36 J. AIR L. & COM. 550 (1970).

[14] *See* Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U.L. REV. 299 (1968).

[15] 350 F. Supp. 757 (S.D. Ohio 1972).

tion, determined that Ohio law, which required mutuality of estoppel, should be disregarded and ruled that there was an existing body of federal law permitting collateral estoppel without the need for mutuality. In reaching this decision, the court expressly recognized that the *Erie* doctrine obliges a federal district court in diversity cases to apply state substantive law defining the rights and obligations of persons with respect to the state-created cause of action. The court reasoned, however, that once a judgment is rendered in accordance with the state's standards, it does not follow that the preclusion or res judicata effect of the judgment upon other pending federal actions should be governed by state law. The Sixth Circuit, in *Humphreys v. Tann*,[16] reversed the ruling of the transferee court and remanded the case to the transferor court for further proceedings. In its decision, the Sixth Circuit determined that although the transferee court had authority to grant summary judgment, that court had improperly applied the doctrine of collateral estoppel, thus denying the plaintiff due process of law. In its opinion, the Sixth Circuit expressly recognized the possibility of the existence of a body of federal law which might apply to the collateral estoppel issue; however, the court felt that it was unnecessary to decide whether such a body of federal law might apply in this instance.

In another recent case in a California district court, the court determined that violation of the Federal Aviation Act and regulations promulgated thereunder creates a federal cause of action, thus granting the court federal question jurisdiction. In *Gabel v. Hughes Air Corp.*,[17] several personal injury actions had been brought as a result of a collision between a military jet and an airliner. The airline, whose principal place of business was in California, moved for dismissal of the actions for a lack of diversity jurisdiction and on the basis that there was no federal question jurisdiction. After first distinguishing the application of the *Erie* doctrine as applying only to diversity cases, the court determined that the violation of the duties set forth in the Federal Aviation Act and its regulations created a federal right, and thus the court had federal question

[16] 487 F.2d 666 (6th Cir. 1973).

[17] 350 F. Supp. 612 (C.D. Cal. 1972).

jurisdiction.[18] This decision has been criticized in a recent opinion by the District Court for the Southern District of New York.[19]

VI. THE KOHR DECISION

In the recent decision by the Seventh Circuit in *Kohr v. Allegheny Airlines, Inc.*,[20] the court made a direct challenge to the *Erie* doctrine. That case arose out of mid-air collision on September 9, 1969, over the airspace of Indiana, between an Allegheny airliner and a private aircraft piloted by a Mr. Carey and owned by Forth Corporation (a wholly owned subsidiary of Brookside Corporation). At the time of the crash, the Allegheny aircraft was receiving and adhering to air traffic control radar directions from an FAA employee. Subsequent to the accident, wrongful death diversity actions were commenced on behalf of the estates of the deceased passengers against Allegheny, Carey's estate, Forth and Brookside, and Federal Tort Claims actions were brought against the United States. Also, property damage claims were instituted to recover for the destruction of the two aircraft. Allegheny and the United States filed cross-claims and third party claims against Carey, Forth and Brookside. As the first cases came to trial, the United States and Allegheny, independently of the other three defendants, arrived at a formula between them to be utilized in disposing of all of the cases, and the district court approved the compromise agreement. Thereafter, the United States and Allegheny proceeded to settle the last few cases. At a subsequent stage of the proceedings, the district court permitted Carey, Forth and Brookside, to file additional paragraphs to their answers, pleading, among other matters, that the Allegheny and United States cross-actions failed to state a claim for relief because no right to indemnity or contribution existed under Indiana law. On the basis of these pleadings, the court then granted motions to dismiss on the part of Carey, Forth and Brookside. On appeal to the Seventh Circuit, the United States and Allegheny raised the issue, *inter alia*, as to whether the district

[18] The court also held that it had pendant jurisdiction over the airline by its jurisdiction over the United States.

[19] D'Arcy v. Delta Airlines, Inc., 12 Av. Cas. 18,282 (S.D.N.Y. 1974). The court expressly declined to follow the reasoning of the *Gabel* decision and determined that the violation of the Federal Aviation Act and regulations promulgated thereunder did not create a federal cause of action.

[20] 13 Av. Cas. 17,297 (7th Cir. Sept. 20, 1974).

court erred in dismissing their cross-claims and third party claims for indemnity and contribution against the other defendants, contending, *inter alia*, that a federal rule of contribution and indemnity should govern the action rather than Indiana law.[21]

The Seventh Circuit held on that issue in the *Kohr* case that there should be a federal law of contribution and indemnity governing mid-air collisions such as the one involved in the litigation. Further, the court determined that the federal rule of contribution and indemnity should be on a comparative negligence basis. Accordingly, the Seventh Circuit determined that it was error for the district court to grant the motions of Carey, Forth and Brookside to dismiss the claims of Allegheny and the United States for indemnity and contribution. As a basis for imposing a federal law of contribution and indemnity, the Seventh Circuit determined that the predominant interest of the federal government in regulating the affairs of the nation's airways and the prevailing federal interest in uniform air regulation was superior to the interest of the state wherein the fortuitous event of the collision occurred. Further, the court determined that the imposition of a federal rule of contribution and indemnity would serve the purpose of eliminating the inconsistency of results in similar collision occurrences due to the application of differing state laws on contribution and indemnity.

In the *Kohr* opinion the Seventh Circuit failed to deal with the application of the *Erie* doctrine even though the jurisdiction of the cases in the district court was based on diversity of citizenship and the Federal Tort Claims Act. It is submitted that in order for the Seventh Circuit to disregard Indiana law and apply a federal law of contribution and indemnity, the impact of the *Erie* doctrine on that decision must somehow be explained or distinguished.

Indeed, in the *Dayton Crash* case,[22] the district court recognized the obvious impact of the *Erie* doctrine on its decision and attempted to distinguish that doctrine. Moreover, in the *Gabel* case,[23] the California district court recognized the *Erie* doctrine and distinguished its application on the basis that the doctrine applied only

[21] On that issue, Allegheny alternatively contended that in view of the number of state jurisdictions involved, with various plaintiffs instituting actions in states other than Indiana, the trial court should have conducted an evidentiary hearing to facilitate the proper choice of law analysis.

[22] 350 F. Supp. 757 (S.D. Ohio 1972).

[23] 350 F. Supp. 612 (C.D. Cal. 1972).

to diversity cases and not to federal question jurisdiction cases.

In a well-reasoned legal analysis, Professor Keefe has proposed that a federal body of common law should be applied to civil aviation tort litigation.[24] He has expressly recognized, however, that this result cannot be accomplished without the abrogation by the Supreme Court of the United States of the *Erie* doctrine as it is applied to aviation diversity cases.[25]

The Supreme Court in recent years seemingly has been willing to review its prior decisions to achieve just results in pending litigation. Indeed, in the case of *Morangne v. States Marine*,[26] the Supreme Court, expressly overruling the case of *The Harrisburg*,[27] determined that there was a right to recover for wrongful death under general maritime law independent of the Jones Act,[28] the Death On the High Seas Act[29] or state law when a death occurred in state territorial waters.

VII. CONCLUSION

Much can be said in favor of the proposition that there should be a federal common law pertaining to civil aviation litigation. Forum shopping under the *Erie* doctrine over the past decade has shown that state choice-of-law problems can become tremendous obstacles to the disposition of aircrash claims on their merits. Inasmuch as it appears that there will be no federal legislation in this area for the foreseeable future, the resolution of this problem will be left to the federal courts. However, this result cannot be accomplished without the re-consideration by the Supreme Court of the *Erie* doctrine as it applies to civil aviation litigation.

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[24] *See* Keeffe, *In Praise of Joseph Story, Swift v. Tyson and the True National Common Law*, 18 AM. U.L. REV. 316 (1968), and Keeffe & DeValerio, *Dallas, Dred Scott and Eyrie Erie*, 38 J. AIR L. & COM. 107 (1972).

[25] Materials cited note 24 *supra*.

[26] 398 U.S. 375 (1970).

[27] 119 U.S. 199 (1886).

[28] 46 U.S.C. § 688 (1970).

[29] 46 U.S.C. §§ 761-67 (1970).